Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 121.

THE STEAMER BELFAST, NELSON, *et al.*, CLAIMANTS,

~~APPELLANTS~~, Plaintiffs in Error

vs.

BOONE, *et al.*

BRIEF FOR DEFENDANTS IN ERROR.

This case is brought here under the 25th section of the judiciary act, by writ of error, to reverse the judgment of the Supreme Court of Alabama.

Originally, there were three separate and distinct actions brought by Boone and *al.*, Steers and *al.*, and Watson and *al.*, under the statute of Alabama, which will be presently referred to and considered. These several actions were upon ordinary contracts of a common carrier for the transportation of goods, and were alike *mutatis mutandis*, as to the parties, the goods, and the places of their delivery, respectively.

The pleadings were according to the law and practice of the State of Alabama, prescribed by the statutes and the actions proceeded side by side in the same court, till they all stood ready for trial.

But the convenience of the parties seems to have suggested that the trial of each one would involve unnecessary expense and trouble; and, accordingly, (see "bill of exceptions," rec. p. 35,) "*it was agreed that all three of said cases should be tried upon the same issue*, AND THE CASE OF BOONE, AND *al.*, WAS SELECTED AS THE CASE."

Judgment being given in the court of original jurisdiction, (the city court of Mobile,) in favor of Boone and *al.*, on the trial of that "selected" case, and in favor of the other two plaintiffs upon the stipulation aforesaid, an appeal was taken to the supreme court of the State, the "bill of exceptions" above referred to, which begins at p. 34 of the record, presenting there the matter for the judgment of that court. Accordingly that court (rec., p. 63,) treated the case as before them in the manner stipulated and agreed in the bill of exceptions, and decided the case of Boone and *al.*, affirming the judgment upon the special facts of that case only, and added:

"As to the other libellants, the bill of exceptions shows that it was agreed that all three cases should be tried upon the same issue, and the case of Boone and *al.* was selected as the case. If Boone and *al.* are entitled to recover, then the effect of the agreement is to authorize a recovery in favor of the other appellees."

It therefore appears by the record that the privilege, right, or exemption, which the plaintiffs in error set up in the supreme court of Alabama, and which that court denied to them was such "privilege, right, or exemption," as by the Constitution and laws of the United States belonged to the plaintiffs in error upon the case of Boone and *al.*, as the same was presented on the record. If there was anything in the cases of the other plaintiffs, or either of them, which gave the plaintiffs in error any other or different right, privilege, or exemption than such as they claimed upon the facts of the case of Boone and *al.* it was not alleged by them, and was not denied or passed upon by that court; and therefore cannot be considered here. This seems so firmly settled as to make the citation of authorities unnecessary.

I.

This preliminary statement reduces the matter of debate here to the single question of constitutional law arising upon the case of Boone and *al.*, to wit:

Is the ordinary contract of a common carrier, made between parties who are citizens of the same State, for the transportation of goods from one town to another, both being in that same State,

without such goods, in transitu, being carried into or through any other State or foreign dominion, a contract which can only be enforced by a proceeding in admiralty in the federal courts?

Prima facie, it would seem to be difficult to state a case more absolutely wanting in every element of federal cognizance, or more plainly within the competency and duty of the State, to fnrnish a convenient and adequate remedy, with such forms of pleading and proceedings generally, (saving always the trial by jury required by the Constitution of the United States,) as to the legislature of the State, acting within the limits prescribed by its own constitution, might seem best adapted to the proposed end.

That the case of Boone and *al.* presents this single question is evident upon the so-called "libel *and complaint*," and the answers of the owners of the Belfast, (which are at pp. 5 and 7 of the record.)

The "libel *and complaint*" (p. 5) states:

"That on or about the 23d day of January, 1866, your libellants shipped on board said steamboat Belfast, *which was a common carrier, then lying at Vienna, in the State of Alabama*, by U. S. Boone and *al.*, *one hundred bales of cotton, the property, &c.; said steamboat being at the time a common carrier, to be transported from Vienna to Mobile, and at Mobile to be delivered to John E. Curran and al., &c., they paying, &c.* That on the way down the river, on the Tombigbee river, *below Vienna, in the State of Alabama*, twenty-nine bales were lost, and not delivered, &c."

And this is admitted by the answer and amended answers (pp. 7, 13, 14;) at last page it is shown by the respondents that the boat was licensed and enrolled as belonging to the port of Mobile.

The particular case then arose in, and concerned alone, *the internal commerce of the State of Alabama*, and therefore it was one with which the laws of that State only could deal. It lay wholly beyond the region of federal powers. And it is quite unimportant in what form, or by what system of pleading and evidence, the State might provide a remedy in such a case. The mere form cannot affect the substance. If the power

exercised be one belonging to the State, and not to the Federal Government, it does not concern the Federal Government whether it be exercised in one form or another; or whether the proceeding be called a libel in admiralty, a bill in equity, or an action at common law; whether given by modern statute, or found in the Year Books. Upon this subject, it may be useful to refer to the opinion of this court, in Gibbons *vs.* Ogden, (9 Wheat.,) Chief Justice Marshal, at page 204, says:

"It is obvious that the Government of the Union, in theexercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means." All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated, powers and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting powers must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

Upon these principles, and upon the aforegoing statement and analysis of the record, it is submitted, that the judgment must be affirmed, since the only case upon the 25th section of the judiciary act presented to the supreme court of Alabama was that of Boone and *al.*—a contract of a purely domestic nature between citizens of the same State, and concerning its internal commerce only; and if it shall be held that the other two cases are also within the 25th section, then at least the judgment must be affirmed as to Boone and *al.*

II.

But suppose this be not so. It is then submitted, that all

three of the original actions, if they might have been instituted in the district court of the United States in admiralty, might also be brought in a State court, the jurisdiction being concurrent; and that the particular remedy given by the Alabama statute, and adopted in these cases, is within the true intent and meaning of the saving in the 9th section of the judiciary act.

That section, in conferring exclusive original jurisdiction in admiralty upon the district courts, saves to suitors their common-law remedies. So far as it is material to the matter in hand, it is as follows:

* * * "And shall also have exc
cognizance of all civil causes of admiralty and
diction, including all seizures under laws of imp
or trade of the United States, when the seizur
waters which are navigable from the sea, by v
more tons burthen, within their respective districts as
upon the high seas, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." (1 Stat. 77.)

What is meant, as well in the act of 1789, as in the Constitution itself, by the "*common law*," has been authoritatively settled by this court in repeated adjudications. The language of the amendment (VII) is as follows:

"In *suits at common law*, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

If this language be compared with that of the statute above quoted, it can hardly fail to be apparent that the words are used in precisely the same sense. Of the several cases which have interpreted them, the most thorough and satisfactory exposition is given in the case of—

Parsons *vs.* Bedford and *al.*, 3 Pet., 446–7.

In that case, Mr. Justice Story, delivering the opinion of the court, says:

exercised be one belonging to the State, and not to the Federal Government, it does not concern the Federal Government whether it be exercised in one form or another; or whether the proceeding be called a libel in admiralty, a bill in equity, or an action at common law; whether given by modern statute, or found in the Year Books. Upon this subject, it may be useful to refer to the opinion of this court, in Gibbons *vs.* Ogden, (9 Wheat.,) Chief Justice Marshal, at page 204, says:

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In our complex system, presenting the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated, powers and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting powers must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

Upon these principles, and upon the aforegoing statement and analysis of the record, it is submitted, that the judgment must be affirmed, since the only case upon the 25th section of the judiciary act presented to the supreme court of Alabama was that of Boone and *al.*—a contract of a purely domestic nature between citizens of the same State, and concerning its internal commerce only; and if it shall be held that the other two cases are also within the 25th section, then at least the judgment must be affirmed as to Boone and *al.*

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That section, in conferring exclusive original jurisdiction in admiralty upon the district courts, saves to suitors their common-law remedies. So far as it is material to the matter in hand, it is as follows:

* * * "And shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." (1 Stat. 77.)

What is meant, as well in the act of 1789, as in the Constitution itself, by the "*common law*," has been authoritatively settled by this court in repeated adjudications. The language of the amendment (VII) is as follows:

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In that case, Mr. Justice Story, delivering the opinion of the court, says:

The phrase "common law," found in the clause, is used in contradistinction to equity and admiralty and maritime jurisprudence.

The Constitution had declared, in the third article, "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority" &c., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court.

When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or [illegible] where, as in admiralty, a mixture of public law and of maritime law and equity were often found in the same suit.

remedies

Probably there were few, if any, States in the Union in which some new legal ~~evidences~~ differing from the old common law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law.

Proceedings in cases of partition and foreign and domestic attachment might be cited as examples variously adopted and modified. In a just sense the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the judiciary act of 1789, chapter 20, which was contemporaneous with the proposal of this amendment; for in the ninth section it is provided, that "the trial of issues in fact in the district courts, in all cases, except civil causes of admiralty and maritime jurisdiction, shall be by jury;" and in the twelfth section it is provided, that "the trial of issues of fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury." And again, in the thirteenth section, it is provided, that "the trial of issues in fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury."

See also The Vengeance, 3 Dall., 297.
Webster *vs.* Reed, 11 How., 437.

Now, it will be observed, that the saving in the statute of 1789 is in favor of "*suitors*"—of those who are seeking a *remedy* in an *admiralty case*. The *cases* which the general words of the section had just before committed to the jurisdiction of the district courts were "civil causes of admiralty and maritime jurisdiction." The "saving" applies to these causes.

Therefore, to show that the case at bar is a "civil cause of admiralty and maritime jurisdiction," shows nothing to the purpose, if it also appear that there was a common-law remedy

at the option of the suitors, and that they elected that remedy. They had the right to do so.

And, as we have seen, common-law cases, or—what is the the same thing in this sense—common-law remedies, are "not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered, or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit." (*Per curiam, ubi supra.*)

It follows, therefore, that if the subject-matter be the adjudication of purely legal rights, without any admixture of equitable rights, and without involving any usurpation of jurisdiction over matters depending upon the public law of nations, or the peculiar maritime law, the proceeding, whatever its form, is a common law remedy, *provided only* that it afford to the parties the opportunity of ascertaining their rights by a trial having the substantial and essential elements of a trial at common law.

A trial at common law is a "*trial per pais.*" This is the one great distinguishing characteristic of a common-law case. Not that it is necessary that, in every case, such trial by a jury should in fact be had; but that the right to it is conceded to both parties. It is not necessary that the suit be begun by the service of process, or by actually bringing into court, in any other way, the party whose rights are to be affected by the proceeding. Attachment suits, and suits for partition, are examples. A defendant may be brought into court as well by seizing his property, and bringing it into court, under circumstances giving him plain and reasonable notice of the cause of its seizure, as by the service of process on his person. If the statute makes provision for his personal appearance, and a day is given to him in court, with the right of trial by jury, then it is as much a common-law case as if it had begun by a *capias ad respondendum*, instead of a seizure of his property. And, on the other hand, though the suit be begun by a capias, and proceeded in throughout according to the most

exact forms of a common-law suit in all things but one, to wit: *the trial by jury*, if that be denied, it is no true case at common law. It is this distinctive quality alone which the Constitution guarantees and preserves from all innovation. And there is no instance in this court in which, where the subject-matter was the adjudication of purely legal rights, and the right of the trial by jury has been "preserved," in which the case has been treated as other than a common-law case, whether a concurrent remedy existed, either in admiralty or in equity, or not, and whatever may have been the mere *form* of the proceedings.

It has been supposed that the case of the steamer A. D. Hine (4 Wallace) is an exception to this rule. But an examination of that case, and of the statute on which the remedy was founded, will show that this is a mistake. It is true that the learned justice, in delivering the opinion of the court, *arguendo*, relies upon the *form* of the proceeding it being *in rem*, without naming any defendant, as proving that it was not a common-law remedy. But *the case* was one in which there was, and could be, *no jury trial*. The statute (Iowa Revision of 1860, p. 656) which authorized the proceeding in that case, although it saved to the plaintiff all his common-law rights, (in imitation of the act of 1789,) made no provision to protect the owner of the vessel, and afforded him no opportunity, by his personal appearance, of converting the proceeding into a common-law trial by jury. It was begun, continued, and ended, and could only be so, as a civil law proceeding *in rem*. The judgment of the court in that case in no degree depends upon the *dictum*—if, indeed, such was the idea in the mind of the learned justice at the time—that the test of a common-law remedy is that there must be a named defendant, against whose person process is prayed. With unfeigned deference and very great respect, it is submitted that such a test is not warranted by the authorities, and cannot be reconciled with the doctrines of this court hereinbefore quoted and referred to. And in the case of Webster & Reed (11 How., 459–60) it is plainly implied that the naming of a defendant is not necessary, and that the attachment of the property is the beginning of a suit

against the owner. The court says: "No person is required to answer in a suit on whom process has not been served, OR *whose property* has not been attached. In this case there was no personal notice, *nor an attachment, or other proceedings against the land*, until after the judgments."

Surely it was not intended to say, in the case of the Hine, that the State of Iowa, or any other State of the Union, could not, in its discretion, provide for its citizens, as to contracts arising between themselves, in their internal domestic commerce, a common-law remedy against the property of *unknown* defendants, who therefore could not possibly be named. Take the case of the partition of lands, an undivided moiety in which has descended to unknown heirs; of goods which have become liable for storage, being the property of a person or persons unknown; or other cases which may be put, of mere *inconvenience* in discovering and naming the *person* chargeable with the debt or demand. In such cases, what principle of constitutional or public law, or natural justice and reason, is there to prevent the State from dispensing with the mere form of naming the defendant, when the suit is begun by the judicial seizure of his property under circumstances which cannot fail to bring him into court, where he is expressly privileged and invited to come, and to try the matter of fact before a jury?

But no stronger case can be put than that which this Alabama statute was intended to provide for.

Long prior to 1864, great inconvenience had been experienced from the want of a certain and ready means of ascertaining who were the owners of steamboats, and their respective interests therein, with a view to legal proceedings against them, founded on common-law contracts or torts. An act of 1854 was passed to remedy this mischief, and required a statement setting forth the desired particulars touching steamboats navigating the waters of the State, to be filed at Mobile, before such steamboat should leave that port on any voyage.

By the case of Sinnott *et al. vs.* Davenport, (22 How., 227,) this act of the legislature was pronounced unconstitutional and void, so far as it purported to affect licensed and enrolled

vessels—which, indeed, embraced probably all the cases to which the statute was intended to apply.

Such having been the fate of the act of 1854, the present statute, instead of attempting to ascertain the names of the owners in advance, gives a lien upon their boat for the specified causes, and authorizes the proceeding to be commenced by a seizure of the property, with notice to the owners of the cause of the seizure, the opportunity of discharging the property upon a bond to answer to the claim, and the absolute right to have the whole matter tried by a jury; or, in other words, according to the course of the common law.

In such a case, it is not perceived what common-law right, privilege, or advantage, of any name or nature, is denied to the defendant, which is not also denied in the ordinary case of a foreign attachment, which is conceded to be a common-law remedy within the saving of the 9th section of the act of 1789. Indeed, practically, it must be evident that this Alabama proceeding must operate much less onerously or injuriously than the ordinary foreign attachment suit; for it is limited to steamboats, which are not commonly found in port without a master, mate, clerk, or somebody on board representing the owner, and, therefore, having immediate notice of the suit; whereas a foreign attachment may be laid on vacant lands, and, in point of fact, the owner have no notice until he finds in possession a purchaser claiming under a judicial sale. In the one case an empty form is used; in the other, what is to all legal intents and purposes equivalent to the actual service of process on the person of the defendant.

If this case is to be determined upon mere forms, which are but shadows; often of things scarcely more substantial than themselves, then the argument for the defendants in error is a mere waste of time, for which an humble apology is due. For the case comes here tricked out in all the drapery of the admiralty, with patches of common-law forms, (such as a "bill of exceptions," &c.,) and must be condemned as a pretender on its mere appearance. But if the only case brought here, under the 25th section, be that of Boone & Co., and so is a case concerning the domestic internal commerce of the State

only, or if all three of the cases are to be reviewed, and they are all cases of suitors who have elected a common-law remedy, in substance and effect, then it is submitted with confidence, that these questionable forms and shapes do not authorize this court to reverse the judgment of the supreme court of a State, administering a law of that State, which it had the constitutional power to enact.

If this were a case of collision, arising upon the theatre covered by the navigation rules prescribed by Congress, very different considerations would enter into its determination. But the nature of the subject seems not to involve, directly or indirectly, any matter of federal jurisdiction, policy, or power.

In conclusion, reverting for a moment to the question, whether any other case than that of Boone & Co. is here for revision, attention is naturally called to the fact, that there is an instrument, styled a writ of error bond, found in the record at p. 2–3.

It will be seen that it is not a *bond*, for want of any obligee. It purports to bind the plaintiffs in error to "*the firm of*" Boone & Co., "the firm of" Steers & Co., and "the firm of" Warren & Co. A writ of error bond is a common-law bond in form; and no action at law could be maintained on this instrument. The case has been discussed on its legal merits; but this objection, if it be sufficient to dismiss the writ of error, is not waived.

J. M. CARLISLE,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

DECEMBER TERM, 1869.

STEAMER BELFAST

VS.

BOON ET AL.

P. PHILLIPS,
Counsel for Appellant.

Washington:
INTELLIGENCER PRINTING HOUSE,
401 and 403 D Street, near 7th.
1869.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

STEAMER BELFAST
vs.
BOON ET AL.

2642 - 2708

By the Code of Alabama it is provided there shall be a lien on all vessels for work and materials done or furnished, and for all debts contracted by the master, owner or consignee, and for the wages of the officers, crew, &c., in preference to other debts due from the owners thereof.

The lien is to be asserted by filing a complaint in any county in which the vessel may be found, stating the amount and nature of the claim, and praying a seizure of the vessel.

Thereupon the Clerk is to issue a writ commanding the Sheriff to seize the vessel, her tackle, apparel and furniture. At any time before judgment, the master, owner or other persons may release the vessel by entering into bond in double the amount of the claim, stipulating to pay the amount of the judgment.

Any number of persons may unite in the same complaint, and if more than one complaint be filed the Court must consolidate them, and render but one judgment against the vessel, which is to be considered several as to each complainant.

If a stipulation be entered into, the stipulators are defendants. If none, the Court must render a judgment ex parte condemning the boat, tackle, &c., to be sold in satisfaction of the claim; and the affidavit of complainant is made presumptive evidence of the justice of the demand.

If a stipulation be entered into, no monition, or notice of the complaint or seizure is necessary; if none, the sheriff is to post a notice of the seizure on the vessel and court-house door, to operate as a monition and notice of seizure to all persons.

If there be less than twenty days between the seizure and return of process, and no stipulation filed, the Court must direct a sale of the vessel for cash.

If the seizure be made sixty days betore the return, and no stipulation within five days thereafter, the sheriff is to sell for cash.

Any obligation entered into for the release of the vessel, whatever may be its form, is to be considered in law as a stipulation.

Finally, the Code provides that, "unless where otherwise provided in this Chapter, the proceedings to enforce the lien shall be the same as in the *Courts of Admiralty* of the United States, but either party may have any question of fact decided by a jury, upon an issue made up under direction of the Court." Code, § 2692-2708.

By the Act of 7th October, 1864, these provisions are extended to the contract of *affreightment*.

Under this statute, Boone & Co. filed their libel (p. 5) in the City Court of Mobile, claiming $5,800 for the loss of twenty-eight bales of cotton, shipped to them from Vienna, in the State of Alabama, to Mobile, and prayed "*process in admiralty* for the service of the said Steamboat Belfast, 30th March, '66.

In the same Court a libel was also filed (p. 20) by J. H. & S. B. Steers, claiming $6,000 for thirty-four bales, shipped from Columbus, Mississippi to Mobile.

And in the same Court a libel was filed by J. Watson & Co. (p 27) claiming $6,000 for thirty bales of cotton, shipped from Columbus, aforesaid, to Mobile.

Under these several libels the sheriff, by virtue of writs

of seizure, (pp 6–21–28) took the steamer into possesion and posted his monitions.

These causes, under the statute, were consolidated (p. 7) and heard together.

An amended answer was filed by intervenors—by leave of the Court—applicable to the three cases, setting forth that the steamer was duly enrolled and licensed, and that on the 15th January, 1866, she was regularly cleared at Mobile for Columbus, Mississippi, and that on her downward trip the cotton claimed was lost, to wit, about the 23d February; they therefore plead that the City Court had no jurisdiction.

The answers also show "that the boat and cargo were captured by a band of robbers, at a point on the Bigbee river where the tide ebbs and flows."

A decree was rendered on 28th July, for the three libelants, and on appeal to the Supreme Court of Alabama, the same was affirmed.

The first assignment of errors in the Supreme Court is:

"The Court erred in taking jurisdiction of *said several cases* not having any jurisdiction of the same, and in overruling the protest to the jurisdiction." (p. 60.)

Though the record presented the *three* cases consolidated, the Court rests its opinion in affirming the judgment in the case of *Boon & Co. alone*, saying "as to the other libellants, it was agreed that all three cases should be tried on the same issue, and the case of Boon & Co. was selected as the case." (p. 63.)

Thus, notwithstanding there was a plea to the jurisdiction in each case in the Court below, and an assignment of error in each case in the Court above, the Court assume to exercise jurisdiction in two of the cases upon a construction of the agreement that they were all to be tried on the same issue.

It is very evident that if the Court had not jurisdiction in the two cases, no agreeement or consent of counsel below

could authorize their action. Want of jurisdiction over *parties* may be waived by appearance and pleading. Want of jurisdiction over the *subject matter* can be taken advantage of in any stage of the cause. Jurisdiction is conferred by the law alone. Consent of counsel can never give it.

Rhode Island vs. Mass. 12 Pet., 657.

Montgomery vs. Anderson, 21 How., 386.

The judgment of the Supreme Court recites that the libellants assert the legality of their libels under the act "*to amend the admiralty laws* of this State, approved 7th October, 1864;" and the appellants insist that the said statute is repugnant to the Constitution of the United States, and the laws made in pursuance thereof—(referring to article 1, section 8, paragraph 3. Also, article 3, section 2, &c., p. 66.)

This writ of error is therefore fully provided for by the 25th section of the judiciary act.

As will be seen, all three of the cases are founded upon contracts of affreightment made with a steamer engaged in navigating the river between Mobile, in Alabama, and Columbus, in the State of Mississippi. The case of Boon & Co. only differs from the others in this: that their cottop was put on board on the downward voyage from Columbus at a point *within* the State of Alabama.

It is unnecessary to go through the decisions on the subject of admiralty jurisdiction. Whether they be reconcilable or not, it is sufficient for the purpose of the case to ascertain the judgment of the Court in its most recent decisions determining the character and limit of that jurisdiction.

In the case of the Moses Taylor, 4 Wall., 424, the action was on a contract for personal transportation. The Court held that this was a maritime contract; that it was not distinguishable from a contract for the *transportation of freight*, and that the breach of either is the appropriate subject of admiralty jurisdiction.

And, further, that the clause of said section which saves to suitors a common law remedy, does not save a proceeding *in rem*, as used in the admiralty courts. Such a proceeding not being a remedy afforded by the common law.

The Court, in defining the nature of the statute in the cause before it, say: "The action provided is in the nature of admiralty proceedings, and the distinguishing characteristic of which is, that the thing proceeded against itself is seized and impleaded, as the defendants, and is sentenced accordingly. That it is this dominion over the thing that gives to the title made under its decrees validity against all the world; while by the common law process property is reached only through a personal defendant, and then only to the extent of his title. In this case, it is true, the contract related to a service to be performed on the high seas, to wit: from New York to San Francisco.

In the Hine v. Trevor, reported in same volume, (p. 556,) the action was for a collision occurring on the Mississippi, near the city of St. Louis. This Record (say the Court) "raises distinctly the question how far the jurisdiction in admiralty is exclusive, and to what extent the State courts can exercise a concurrent jurisdiction." Owing to the importance of the principles involved, the "case was held under advisement for some time, in order that every consideration which could influence the result might be deliberately weighed."

The Court affirm the judgment given in the case of the "Moses Taylor," and re-assert the doctrine declared in the case of the "Genesee Chief," that the "principles of admiralty jurisdiction, as conferred on the Federal Courts by the Constitution, extend *wherever ships float*, and *navigation successfully aids commerce, whether internal or external.*"

It further declares that the grant of this power under the act of 1789 is exclusive not only of all other Federal Courts, but of all other State courts, and, therefore, State statutes

which confer upon State courts a remedy for marine torts *and marine contracts*, by proceedings strictly *in rem*, are void.

The statute of Iowa, then before the Court, was subjected to the same criticism as was applied in the California case, and for like reasons held void.

I have quoted the provisions of the Alabama code to show that they are precisely, those of the acts quoted in the above cases, and subject to the same condemnation.

Assuming that these principles fully cover the two cases of shipment from Columbus, does the case of Boon & Co., where the shipment was from Vienna, differ from them in legal construction?

Is the same vessel on the same voyage from one foreign port to another subject to different jurisdictions on her contracts of affreightment.

May she be seized by an Alabama court, and summarily sold, so as to divest the right of all freighters living in other States, solely on the ground that the freight was taken at a point within State borders?

If the admiralty jurisdiction extends over every portion of the navigable river, and the contract of affreighment also pertains to that jurisdiction, it would seem to follow that the particular place of shipment can in nowise affect the question.

Where a vessel is engaged solely in trading within a State she may be subjected by State laws to a lien in favor of material men at her home port. This is not an *admiralty lien*; the power of the State to create the lien is therefore clear, and it would seem to follow that the mode of enforcing it is equally within the competency of the State authority.

But this does not apply to a case when the vessel is engaged in voyaging from one State to another, and where the claim is made on a contract maritime in character.

If this vessel had been solely employed in navigating from

point to point in the same State, still her affreightment contracts would be within admiralty jurisdiction and so exclude all proceedings under State authority.

The discussion in the case of Jackson *vs.* Magnolia is full of instruction. The Alabama river lies wholly within the State; no port of entry above Mobile has been established. Two hundred miles above the ebb and flow of the tide the steamer Wetempka, a boat used exclusively within the State, collided with the Magnolia. The district court was appealed to—the case was dismissed for want of jurisdiction—and this decree was reversed by this court.

The plea was that the collision took place within the body of the county and above tide-water.

This court held, "that before the adoption of the Constitution, each State had its own court of admiralty with jurisdiction over the harbors, creeks, inlets, and public navigable waters. This jurisdiction was exercised not only over rivers, creeks, &c., which were boundaries to or passed through other States, but also *when they were wholly within a State.*"

When, therefore, the States surrendered this jurisdiction, "without exception as to subjects and places, this court cannot interpolate one into the Constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent."

It is true that the jurisdiction here asserted was in a case of *tort* as was the case of ~~Downey~~ *vs.* Clark, but the scope of the decision was understood by Mr. Justice Campbell to reach much further. He says "the principles of this decree, carried to its logical extent, embrace all cases for the transportation of persons and property from the towns and landing places of the different States to other towns and landing places, whether in or out of the State." (p. 341.)

If, before the Constitution was adopted, the States in their sovereign character, claimed to excuse admiralty jurisdiction over rivers wholly within their borders it cannot be that that

jurisdiction was confined to torts, and excluded contracts of a maritime nature. The admiralty has no such limitation.

If admiralty had jurisdiction for the collision by the Wetempka, what reason can be assigned why the jurisdiction could not be equally maintained on a contract with the Magnolia to carry her goods from the point of collision to Mobile, or any other place within the State? The subject matter and the locus are both within the jurisdiction, notwithstanding the Wetempka was engaged wholly in inter-State commerce.

In the discussion of this jurisdictional question, the constitutional grant of power over commerce has been referred to. That expressly limits the authority of Congress to the regulation of commerce "with foreign nations, and among the several States, and with the Indian tribes."

It is a clear deduction from this that commerce which is confined within the boundaries of the State is not within the grant.

But the grant of admiralty jurisdiction is a substantive and distinct thing, and we cannot accept its limitations from the restrictions imposed on another power.

These questions are referred to a decision of the Chief Justice in the case of the Mary Washington *vs.* Ayres, decided in the circuit court of Maryland, and reported in the American Law Register, September, 1866, p. 692; in which he sustained the jurisdiction in admiralty, on the precise state of facts presented in the case under consideration.

So in the case of the United States *vs.* The Bright Star, decided by Mr. Justice Miller, in the Missouri Circuit, it is held "we are thoroughly impressed with the conviction that there is a commerce strictly internal to each State over which Congress has no control, though it may be carried on by means of one of the navigable rivers of the United States, and that Congress has steadily kept this in view in its legislation."

"It has been strongly urged that the admiralty jurisdiction extends to all the navigable waters, though the voyage may be limited to port in the same State; and that a corresponding rule should be applied to the powers of Congress over the commerce so carried on."

"But if we concede that the proposition is true as to the admiralty jurisdiction—*a concession which must be made in the face of many decided cases*—the inference claimed by no means follows."

"The grant of the admiralty jurisdiction is to the Court of the United States. The power over commerce is granted to Congress. The grant of admiralty power is unlimited except by the nature of admiralty jurisdiction. The grant of the power to Congress is limited expressly to the regulation of certain kinds of commerce, and excludes by necessary inference all other commerce. On this subject we agree entirely in what is said by Chief Justice Chase in the case of the Mary Washington."

Since the decision of the Supreme Court of Alabama, in this case, this court has itself decided in the case of "The Mist" vs. Martin, that contracts of affreightment between the port of Mobile and a port in another State cannot be enforced in the State court. This covers two of the cases presented in this record.

Under the two recent decisions of this court, already cited, it is submitted that the judgment must be reversed.

P. PHILLIPS,
For Appellant.